UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:

CASE NO. 95-50902

MICHAEL GIBBS and GISELLE GIBBS,

Debtors. **DECISION & ORDER**

MICHAEL GIBBS and GISELLE GIBBS,

Plaintiffs,

V. **A.P. No. 97-5080**

MARINE MIDLAND BANK, N.A.,

Defendant.

PROCEDURAL STATUS

Defendant, Marine Midland Bank, N.A. ("Marine"), holds a 1993 judgment (the "Marine Judgment") against the "Debtors" with an unpaid balance of approximately $1,596,000.00. The Judgment was obtained in a foreclosure action commenced after the Debtors defaulted on a promissory note and second mortgage which they executed in favor of Marine when they purchased a residence in New Canaan, Connecticut (the "New Canaan Property"). In the foreclosure action the state court dismissed a counterclaim interposed by the Debtors which alleged that Marine had wrongfully terminated its obligations under a certain commitment letter (the "Commitment Letter") which provided for Marine, subject to certain terms and conditions, to make a $165,000,000 loan in connection with a proposed leveraged buy-out of two corporations. The Debtor, Michael Gibbs ("Gibbs"), was a significant shareholder in one of the corporations which was to have been acquired, Aqua Fab Industries, Inc. ("Aqua Fab"). However, the proposed acquisition of Aqua Fab was never completed

and Gibbs was not able to realize the profits that he had expected to receive from the sale of his stock in Aqua Fab, a portion of which he anticipated using for the Debtor's purchase of the New Canaan Property. Gibbs has alleged that the reason the acquisitions did not close was due to a lack of financing because of Marine's wrongful termination.

In June 1995, the Debtors filed a Chapter 11 petition.[1] On June 18, 1997, the Debtors commenced an adversary proceeding (the "Adversary Proceeding") against Marine. In their Complaint, the Debtors alleged various causes of action similar to those asserted in their counterclaim in the state court foreclosure action which the state court dismissed.

Marine has moved for summary judgment (the "Motion for Summary Judgment") to dismiss the complaint and the Adversary Proceeding on the grounds that: (1) the Debtors have failed to raise any genuine issues of material fact concerning any potential liability on the part of Marine; and (2) as a matter of law, Marine is not liable to the Debtors on any of their alleged causes of action.

BACKGROUND[2]

In the 1970's and 1980's Gibbs was an investment banker with an extensive background in mergers and acquisitions. In 1987, he formed Aqua Fab in order to simultaneously acquire four companies engaged in the swimming pool and spa industry. Gibbs was the largest individual shareholder, the CEO, and the Chairman of the Board of Directors of Aqua Fab, which, by February 1989, manufactured and distributed vinyl liner swimming pools and accessories through 18 distribution

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[1] Unless otherwise indicated, all Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C. Section 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

[2] The Background facts are for the most part taken from Marine's Motion for Summary Judgment. They appear not to be disputed.

branches owned and operated throughout the United States and was one of the largest companies in the swimming pool industry.

In February 1989, Aqua Fab entered into a Letter of Intent with Merrill Lynch Capital Partners,[3] whereby the parties agreed to negotiate the terms for an acquisition of Aqua Fab. At the time the Letter of Intent was executed, Gibbs and others owned 60% of Aqua Fab and the remaining 40% was owned by Merrill Lynch Interfunding and Household Commercial Financial Services. Both Merrill Lynch Interfunding and Household Commercial had provided debt financing facilities to Aqua Fab which would have been paid off as part of the proposed acquisition.

On March 22, 1989, prior to the execution of a definitive acquisition agreement or the actual acquisition of Aqua Fab, the Debtors entered into a contract to purchase the New Canaan Property for $2,800,000. The Debtors have asserted that they expected that the Aqua Fab acquisition would proceed without any problems and that they would be able to buy the New Canaan Property for cash from the proceeds Gibbs was to receive for his common stock. On March 22, 1989, the Debtors also owned a home in Remsenburg, New York, which they had purchased in October, 1987 for $1,300,000 and which they intended to retain as a seasonal residence.

During the spring of 1989, Merrill Lynch Capital Partners decided to combine the proposed acquisition of Aqua Fab with another company, Rowe International, Inc. ("Rowe"), which was the leading manufacturer of jukeboxes in the world.

In April 1989, Merrill Lynch Capital Partners approached Marine in an effort to procure financing for the Aqua Fab-Rowe acquisition. On July 6, 1989, Marine issued the Commitment Letter

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[3] At that time Merrill Lynch Capital Partners was looking for investments for its second LBO Fund, Merrill Lynch Capital Partners Appreciation Fund II ("Fund II") (Exhibit "B" to the Affidavit of David J. McNamara in Marine's Motion for Summary Judgment.)

to Manufacturing Holdings, L.P. ("Manufacturing Holdings"), a limited partnership formed for sole the purpose of acquiring 100% of the stock of Aqua Fab and Rowe pursuant to the two separate Sale Agreements. Merrill Lynch Capital Partners was the general partner of Manufacturing Holdings. The Commitment Letter provided for certain financial accommodations to be made in connection with the Aqua Fab-Rowe acquisition, and it included a 10-page term sheet as well as a summary of the terms and conditions upon which Marine would provide the financial accommodations. The Commitment Letter provided that the contemplated loans were to be made to Manufacturings Finance and Management Corporation ("Manufacturing Finance"), a wholly owned subsidiary of Manufacturing Holdings, and to Aqua Fab. Furthermore, these loans would be unconditionally guaranteed by Aqua Fab, Rowe, and Manufacturing Holdings. Gibbs was never identified as a borrower or guarantor in the Commitment Letter or the term sheet, nor was he involved in any of the negotiations with Marine that resulted in the Commitment Letter.

On July 7, 1989, the Commitment Letter was countersigned by Gerald Armstrong ("Armstrong"), a managing director of Merrill Lynch Capital Partners, the general partner of Manufacturing Holdings, the promisee under the Commitment Letter. Although the Commitment Letter did not make Marine's ability to syndicate portions of the loan to other financial institutions a specific contingency, the term sheet made it clear that other financial institutions would participate in the credit and Armstrong was aware that Marine would syndicate a portion of the loan provided for in the Commitment Letter.

With the Aqua Fab acquisition delayed because of the packaging by Merrill Lynch Capital Partners of the Aqua Fab and Rowe acquisitions, it became clear that the Debtors would be required under the terms of their purchase contract to close on the New Canaan Property before Gibbs would receive any funds from the Aqua Fab-Rowe acquisition. In May 1989, Gibbs initiated discussions with

Marine in an effort to procure a $3,000,000 bridge loan so that the Debtors could close on the New Canaan Property. Gibbs never finalized these discussions with Marine because the Aqua Fab acquisition never closed.

In August 1989, Marine and Merrill Lynch Capital Partners agreed that Aqua Fab's financial performance had deteriorated to a point that there were sound business reasons for not completing the Aqua Fab acquisition. Specifically, it was determined that since the time the Commitment Letter was issued, Aqua Fab's profit margins had substantially decreased. As a result, Marine withdrew its position under the Commitment Letter and Merrill Lynch Capital Partners made no further effort to procure financing from an alternative source and terminated the Merger Agreement that it had previously entered into with Aqua Fab.[4]

Even though the Aqua Fab acquisition did not take place, on December 4, 1989, the Debtors closed on their purchase of the New Canaan Property by assuming the seller's existing mortgage and obtaining a loan from the personal banking department of Marine for $1,800,000, secured by a second mortgage on the New Canaan Property.

In December 1990, the Debtors sold their Remsenburg home and reduced their debt to Marine by $800,000. After the Debtors defaulted on the second mortgage, Marine commenced its state court foreclosure action.

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[4] The Debtors in their submissions in opposition to the Motion for Summary Judgment have also asserted that Merrill Lynch Capital Partners was obligated to proceed with the acquisition, even absent financing from Marine, and that Merrill Lynch Capital Partners had breached its obligations under the Aqua Fab Merger Agreement by terminating the Aqua Fab acquisition without putting forth a good faith effort to procure financing. However, the Debtors have not indicated that they, Aqua Fab, or any other shareholders of Aqua Fab have ever commenced an action against Merrill Lynch Capital Partners.

DISCUSSION

I. Summary Judgment

Under Federal Rule of Civil Procedure 56(c), judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Rule is clear in "provid[ing] that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Repp v. Webber*, 132 F.3d 882 (2nd Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (further citations omitted)).

Further, as a general rule, all ambiguities and inferences to be drawn from the underlying facts should be resolved in favor of the party opposing the motion, and all doubts as to the existence of a genuine issue for trial should be resolved against the moving party. *Brady v. Town of Colchester*, 862 F.2d 205, 210 (2nd Cir. 1988) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 330 (1986) (further citations omitted)). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Repp v. Webber,* 132 F.3d at 889 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986) (further citations omitted)).[5]

The duty of a Court on a motion for summary judgment is to determine whether there are any genuine issues of material fact to be resolved by trial, and not to decide factual issues. As the Second Circuit has aptly stated: "In this regard, the Court's task is issue identification, not issue resolution. In

[5] This Court is mindful that factual materiality is governed by reference to the applicable substantive law. *Repp v. Webber,* 132 F.3d at 890. In this case, of course, references are to the substantive law governing actions for breach of contract, fraud, and third party beneficiaries. *See Sections II-IV below.*

performing this task, we must assume the truth of the non-movant's evidence." *Repp v. Webber*, 132 F.3d at 890; see also *Anderson v. Liberty Lobby Inc.,* 477 U.S. at 249.

The moving party, however, does not bear the burden of proving that his opponent's case is "wholly frivolous." *Brady v. Town of Colchester*, 863 F.2d at 210; see also *Celotex,* 477 U.S. at 323-26. The Second Circuit in *Brady* further stated that: "In *Celotex*, the Supreme Court made it clear that in cases where the non-movant will bear the ultimate burden of proof at trial on an issue, the moving party's burden under Rule 56 will be satisfied if you can point to an absence of evidence to support an essential element of the non-moving party's claim." *Brady,* 863 F.2d at 210-11. As such, the respective evidentiary burdens of each party will guide this Court in its determination of the present Summary Judgment Motion." *Id.*

In its Motion for Summary Judgment, Marine, as the moving party, has attempted to demonstrate that the evidence presented by the Debtors in the Adversary Proceeding, specifically in their submissions in opposition to the Motion for Summary Judgment, is insufficient as a matter of law to establish their claims. If a moving party like Marine is successful in demonstrating this, the burden shifts to the non-moving party, in this case the Debtors, to come forward with persuasive evidence that their claims are not "implausible." *Brady,* 863 F.2d at 211. "In evaluating the sufficiency of the non-moving party's evidence, however, courts must still proceed very cautiously." *Id.*

With these considerations in mind, I have examined each of the Debtors' causes of action and claims and the evidence that they have presented in support of their causes of action and claims and in opposition to the Motion for Summary Judgment.

II. Claims for Breach of Contract

A. Intended Beneficiary

The Debtors in their Complaint in the Adversary Proceeding and in their submissions in opposition to the Motion for Summary Judgment have acknowledged that Gibbs, in his capacities as a former shareholder, officer and director of Aqua Fab, does not have standing to assert, and cannot recover any damages on his own behalf for, any causes of action that Aqua Fab or Manufacturing Holdings, the promisee under the Commitment Letter, may have had as the result of what the Debtors have alleged were a wrongful termination by Marine of its obligations under the Commitment Letter and a fraud committed by Marine.

The Debtors have, however, asserted that Gibbs has a direct cause of action and right to recover damages against Marine for breach of contract as a result of the alleged wrongful termination because the Debtors have asserted that Gibbs is what is commonly referred to as a third party beneficiary, or what is defined as an intended beneficiary in the Restatement (Second) of Contracts, Section 302, of the promises that Marine made in the Commitment Letter.[6]

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[6] Section 302 of the Restatement (Second) of Contracts provides that:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

From the decisions of various Federal Courts within the Second Circuit and the Appeals Courts in New York State[7], we know that: (1) the third party beneficiary concept arises from the notion that it is just and practical to permit the party for whose benefit the contract is made to enforce it against one whose duty it is to pay or perform, *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc.*, 66 N.Y.2d 38, 43 (1985) ("*Fourth Ocean*"); (2) in determining intended third party beneficiary status it is permissible for the Court to look at the surrounding circumstances as well as the agreement in question, and an intended third party beneficiary need not be identified in or be a party to the agreement, but it must show that it was the intent of the parties to the agreement to benefit that party, *Trans-Orient Marine Corporation v. Star Trading & Marine, Inc.,* 925 F.2d 566, 573 (2nd Cir. 1991) ("*Trans-Orient*"); (3) an intended third party beneficiary must demonstrate that the agreement or covenant in issue was entered into for its benefit, or at least that such benefit must be the direct result of performance under the agreement, and therefore within the contemplation of the parties, *Goodman-Marks Associates, Inc. v. Westbury Post Associates et al.,* 70 A.D.2d 145, 148 (2nd Dept. 1979) ("*Goodman-Mark*s"); (4) it is the intention of the promisee that is of primary importance in ascertaining whether a party is found to be an intended third party beneficiary, since it is the promisee who presumably secured the promise by furnishing the consideration therefor, *Goodman-Marks*; (5) recognition of a right to performance in the intended third party beneficiary is appropriate to effectuate the intention of the parties, *Fourth Ocean*, and *Common Fund for Not-Profit Organizations v. KPMG Peat Marwick L.L.P.,* 951 F.Supp. 498, 500 (S.D.N.Y. 1997) ("*Common Fund*"); and (6) the proof must

[7] As contended by Marine, the legal determinations made in this case shall be governed by New York Law. This contention is not disputed by Gibbs. Further, the Commitment Letter provides at Page 3 that: "this letter and financial accommodations referred to herein shall be governed by the Laws of the State of New York."

suggest that the agreement was made primarily to benefit the intended third party beneficiary, *Common Fund*.

At Paragraph 56 of his February 25, 1998 Affidavit (the "Gibbs Affidavit"), Gibbs stated that: "there can be no doubt as made clear in our accompanying Memorandum of Law, that I was understood to be an intended beneficiary of the financing Marine was to provide to close this transaction." At Page 13 of the referenced Debtor's Memorandum of Law it was stated that: "it is indisputable that Gibbs was an intended beneficiary with respect to the Commitment Letter by which Marine, as promisor, agreed to provide Manufacturing Holdings, as borrower and promisee, with $165 million to, among other things, fund the acquisition of all of the outstanding capital stock of Aqua Fab Industries, Inc.... and Rowe International, Inc...."

However, other than pointing out that: (1) Marine's internal due diligence report in connection with the financing requested by Merrill Lynch Capital Partners on behalf of Manufacturing Holdings indicated that Gibbs would receive roughly $8,000,000 from the Aqua Fab-Rowe acquisition proposed to be financed in part by Marine;[8] and (2) Gibbs would have received funds for the purchase of his stock in Aqua Fab if the both the Marine financing and the Aqua Fab-Rowe acquisition had closed, the Debtors have not set forth any facts or other evidence in their Complaint or in their opposition to the Motion for Summary Judgment from which a Court could find that Gibbs was an intended or third party beneficiary of all or any of the promises contained in the Commitment Letter. The Debtors have simply presented no credible evidence from which a Court could find that Gibbs: (1) who did not participate in the negotiations for the Commitment Letter; (2) was not a party to the Commitment Letter or even

[8] The same due diligence report which Gibbs so heavily relies on also indicated that of the amounts that were to have been provided by Marine pursuant to the Commitment Letter, as much as $110,000,000 might have been used for the purchase of Rowe common stock and $40,000,000 used for the purchase of Aqua Fab common stock.

mentioned in it; (3) was not directly involved in the termination of Marine's obligations under the Commitment Letter; and (4) was just one of a number of shareholders who may have incidentally benefitted from the financing, was an intended third party beneficiary within the meaning of the Restatement (Second) of Contracts.

There is nothing in the submissions by the parties, including the documents and the depositions of the representatives of Merrill Lynch Capital Partners, Manufacturing Holdings or Marine, the parties to the Commitment Letter, that indicates that Gibbs was any more of an intended beneficiary than the other holders of the common stock of Rowe or Aqua Fab, or that any of these stockholders were in fact "intended" rather than "incidental" beneficiaries of the promises contained in the Commitment Letter. Rather, this evidence indicates that the financing obtained by Merrill Lynch Capital Partners was primarily intended by these parties to finance the acquisition of Rowe and Aqua Fab for the benefit of the investors in Fund II, which was to invest in the new post-acquisition entity, even though some former owners like Gibbs might also acquire an interest in the new entity. The fact that the common stockholders of Rowe and Aqua Fab would have their stock purchased as part of the acquisition was necessary to the overall acquisition transaction, but it only made these many shareholders incidental beneficiaries of the financing transaction evidenced by the Commitment Letter. That Merrill Lynch Capital Partners, the general partner of Manufacturing Holdings, the promisee under the Commitment Letter, suggested and required that the potential acquisitions of Aqua Fab and Rowe be combined in order to make the acquisition package easier to finance and more attractive to investors further evidences this primary intention.

In summary, even if the allegations made by Gibbs are viewed in a light most favorable to the Debtors, Gibbs could not be found to be an intended third party beneficiary of the promises contained in the Commitment Letter, because: (1) in evaluating all of the evidence presented, the surrounding

circumstances and the Commitment Letter itself, it must be concluded that the primary purpose of Merrill Lynch Capital Partners, as the general partner of Manufacturing Holdings, in negotiating for and obtaining the financing covered by the Commitment Letter was to obtain some of the financing that was required to complete the acquisitions of Rowe and Aqua Fab for the benefit of the Fund II investors; (2) the fact that the common stockholders of Rowe and Aqua Fab would have their stock purchased as part of the underlying acquisition made them at best merely incidental beneficiaries of the financing within the meaning of the Restatement (Second) of Contracts; (3) recognizing a right to performance from Marine in either Gibbs or any of the other shareholders of Rowe or Aqua Fab would not be appropriate to effectuate the intentions of the parties to the Commitment Letter, Marine and Merrill Lynch Capital Partners, as general partner of Manufacturing Holdings; and (4) the intention of Merrill Lynch Capital Partners, as general partner of Manufacturing Holdings, the promisee under the Commitment Letter, in procuring the financing was not primarily to benefit Gibbs or the other shareholders of Rowe or Aqua Fab.

Although the Debtors in their submissions raise many potential disputed issues of fact concerning whether the Commitment Letter was properly terminated, all of those disputed facts are only relevant and material in deciding the Motion for Summary Judgment if Gibbs was a intended third party beneficiary of the Commitment Letter with a potential cause of action for a wrongful breach of contract. Since insufficient credible evidence has been presented by the Debtors, even when viewed in a light most favorable to them, to support a finding that Gibbs was an intended third party beneficiary of the Commitment Letter, all of the alleged disputed facts regarding wrongful termination that have been raised by the Debtors are irrelevant and immaterial. Furthermore, nothing has been presented by the Debtors in their submissions in opposition to the Motion for Summary Judgment which indicates that

further discovery would result in any additional credible evidence which could support the required finding that Gibbs was an intended third party beneficiary.

B. Wrongful Termination

Even if the evidence presented by the Debtors in their opposition to the Motion for Summary Judgment, when viewed in a light most favorable to them, could support a finding that Gibbs was an intended third party beneficiary of the promises contained in the Commitment Letter, the Debtors have not presented sufficient credible evidence in their submissions in opposition to the Motion for Summary Judgment from which a Court could find that Marine wrongfully terminated its obligations under the Commitment Letter, or that there are genuine issues of material fact which, if resolved in favor of the Debtors, could result in such a finding.

More than eight years after Marine notified Merrill Lynch Capital Partners, as the general partner of Manufacturing Holdings, the promisee under the Commitment Letter, that it was terminating its obligations under the Commitment Letter, the Debtors have produced no credible evidence from which a Court could conclude that the termination was wrongful. In fact, it appears from the depositions of Armstrong and George Tongring ("Tongring"), a then Senior Vice President of Marine who was the responsible officer within Marine for the Commitment Letter transaction, that there were good reasons and proper cause for the termination of Marine's obligations under the Commitment Letter; specifically, the deteriorating financial condition of Aqua Fab.

The Debtors make much of their allegations that: (1) Marine terminated its obligations under the Commitment Letter because it was unable to syndicate a portion of the required $165 million loan; (2) the ability to syndicate a portion of the loan was not a specific written condition of the Commitment Letter; and (3) the inability to syndicate a portion of the loan would, therefore, not permit Marine to terminate its obligations under the Commitment Letter.

When it terminated its obligations under the Commitment Letter, Marine did not issue a written termination setting forth the reasons for the termination and Tongring, in his deposition, never acknowledged that Marine terminated its obligations, in whole or in part, because of an inability to syndicate a portion of the loan. The only evidence produced by the Debtors in their submissions that indicated that Marine may have terminated its obligations under the Commitment Letter in part because of an inability to syndicate a portion of the loan was the following recollection by Armstrong in his deposition:

> Q: At any time were you told by anyone at Marine Midland that the reason they didn't want to go forward was because they weren't able to syndicate the loan?
>
> A: I really don't recall if that was the sole reason or one of the reasons.

This scintilla of evidence, which may at best indicate that an inability to syndicate the loan may have been one of the reasons that Marine terminated its obligations under the Commitment Letter, is not sufficient to support a finding of wrongful termination, nor does it raise a sufficient genuine issue of material fact sufficient to defeat the Motion for Summary Judgment.

This is especially so because Armstrong, who negotiated and accepted the Commitment Letter on behalf of Merrill Lynch Capital Partners, as the general partner of Manufacturing Holdings, testified in his deposition he was aware Marine would be syndicating a portion of the loan and, if it was unsuccessful in doing so, it would not go forward with the loan.[9]

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[9] In his deposition, Armstrong testified regarding a syndication of the loan as follows:

> "Q: Let me break it down. After receiving the commitment letter was it your expectation that Marine Midland would be providing a total of $165 million in financing by itself?
> A: If the 165 million total financing is what this letter says, I haven't added it up, no. Typically, they would syndicate that. No bank generally, in that era or now, would take that much of a loan on its own balance sheet.

Therefore, the understanding of the parties to the Commitment Letter was that a termination because of an inability to syndicate a portion of the loan would not have been a wrongful termination of the obligations of Marine under the Commitment Letter. In this regard, an intended third party beneficiary can not have greater rights and remedies under the agreement in question than the promisee.

III. Cause of Action for Fraud

The Debtors in support of their cause of action against Marine for fraud have alleged that: (1) Marine falsely represented to Gibbs, presumably as an intended third party beneficiary of the promises made in the Commitment Letter, that its commitment to lend was not in any way contingent upon it being able to syndicate a portion of the loan when, in fact, that was its intention; (2) Marine made this misrepresentation of its intention to Gibbs, again, presumably as an intended third party beneficiary, with the intent to deceive him; and (3) Gibbs relied on this misrepresentation in not seeking other acquisition financing for Aqua Fab.[10]

Once again, the Debtors' ability to prevail at trial on this alleged cause of action for fraud, and to have the Motion for Summary Judgment denied, depends upon Gibbs being found to be an intended third party beneficiary of the Commitment Letter because, clearly, Marine made no direct representations of any kind to Gibbs. Gibbs: (1) did not participate in the negotiations which resulted

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> Q: But with respect to the specific transaction, after receiving the commitment letter that you ultimately signed, was it your understanding that if Marine Midland could not syndicate the $165 million they would have had the right to cancel the loan?
> A: I can only answer that question as a general practice. I just don't recall the specifics in this transaction.
> Q: Please give us your best answer then.
> A: The general practice would be if a bank is unable to syndicate a transaction under a commitment letter, that the transaction doesn't go forward."

[10] This is an element of reliance not pled in the Complaint in the Adversary Proceeding, but only raised in opposition to the Motion for Summary Judgment.

in the Commitment Letter; and (2) was not a party to the Commitment Letter or even mentioned in the Letter. Since, as discussed above, the Debtors have not presented sufficient credible evidence for a Court to find that Gibbs was an intended third party beneficiary, their alleged cause of action for fraud cannot survive the pending Motion for Summary Judgment.

Furthermore, the Debtors' allegations with regard to a cause of action for fraud appear to be nothing more than an inartful restatement of their alleged cause of action for a wrongful breach of contract. (See *Wallace v. Crisman*, 173 A.D.2d 322 (1st Dept. 1991).)

Also, as discussed above, Armstrong, as the general partner of Merrill Lynch Capital Partners, the general partner of Manufacturing Holdings, the promisee under the Commitment Letter, testified in his deposition that he was aware that Marine would be syndicating all or a portion of the loan which it had committed to, and that it would not go forward with the loan if it could not successfully syndicate a portion of the loan. Therefore, this possible contingency was not misrepresented to Manufacturing Holdings, the promisee of the Commitment Letter, and it did not rely on the absence of such a written contingency even if there was an inadvertent omission in the Commitment Letter.

In addition, even if they could establish all of the other elements of a cause of action for fraud,[11] the Debtors have presented no credible evidence to satisfy their burden to demonstrate the required element that Marine intended to deceive Gibbs in making this alleged misrepresentation. What possible benefit from Gibbs did Marine obtain or could Marine have hoped to obtain in connection with the loan transaction that would have caused it to have intentionally misrepresented the fact that it would

[11] Under New York Law, a common law fraud claim requires proof that plaintiff justifiably relied on a false representation of material fact made by a defendant with intent to deceive, and that plaintiff was damaged thereby. Flickinger v. Harold C. Brown & Co., Inc., et al., 947 F.2d 595, 599; Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966, 970-71 (2d Cir. 1987); Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 119, 250 N.E.2d 214, 217 302 N.Y.S.2d 799, 803 (1969).

syndicate a portion of the loan for the purpose of deceiving Gibbs. From Armstrong's testimony in his deposition, this appears to have been a standard practice of lenders in these kinds of transactions at the time, and it was a practice and requirement of which Armstrong, who brought the proposal to Marine, was aware.

IV. Cause of Action for Detrimental Reliance or Promissory Estoppel

In the Debtors' Memorandum of Law in Opposition to the Motion for Summary Judgment it is asserted that the Debtors' cause of action for detrimental reliance or promissory estoppel is based upon the provisions of the Restatement (Second) of Contracts, Section 90, which provides that:

> a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third party and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The Debtors have presented no specific facts, disputed or otherwise, from which a Court could find that Marine should reasonably have expected Gibbs or any other common stockholder of Rowe or Aqua Fab to rely on its promises to Manufacturing Holdings under the Commitment Letter, which were subject to a number of contingencies. Specifically, in the case of Gibbs, it would not be possible for a Court to find that Marine would reasonably expect Gibbs to have done anything in connection with his acquisition of the New Canaan Property based upon the Commitment Letter, especially when Gibbs contracted to purchase the Property prior to the issuance of the Commitment Letter, and elected to close on the New Canaan Property after Marine terminated its obligations under the Commitment Letter.

Furthermore, after reviewing all of the pleadings and the surrounding facts and circumstances in this Adversary Proceeding, I do not believe that a Court could find that justice would be served by enforcing an equitable remedy, a cause of action for detrimental reliance or promissory estoppel, in

favor of the Debtors in connection with Marine's termination of its obligations under the Commitment Letter.

CONCLUSION

The Motion for Summary Judgment is in all respects granted.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: August 7, 1998